

This case has come before the Board on two other occasions, both involving issues bearing upon the compensability of claimant's claim. In each instance, the ALJ resolved those issues in respondent's favor, but on appeal, the Board reversed and found the claim compensable. At the last presentation, it was determined that claimant's accident date

was August 29, 2006. This decision was not made on a whim. Rather, it was based upon the Legislature's recent amendments to K.S.A. 44-520. At that time, this Board Member even noted:

Admittedly, the date of accident occurring on August 29, 2006, 3 weeks after claimant last worked for respondent is logically problematic. But the Legislature has determined that last date worked was no longer acceptable and one could argue that the legal fiction created by the new version of the statute is just as problematic as the "last date of exposure" dictated by *Treaster*¹ and its progeny.²

As a result of the new statute, claimant's date of accident was determined to be August 29, 2006, a date that claimant was not earning wages. This date is a pure legal fiction but is based upon the strict language of the statute. When the matter was returned to the ALJ, another issue emerged—the rate of TTD to be paid. The parties had originally agreed to the maximum statutory rate based upon claimant's wages, \$483 per week. But when this matter came back before the ALJ, respondent was only willing to pay the minimum statutory weekly rate provided for in the statute, \$25, reasoning that claimant had no wages on his judicially-determined date of accident. And based upon K.S.A. 44-510c, the most he was entitled to was \$25 per week.

The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.³ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁴

K.S.A. 44-534a grants authority to an administrative law judge to decide issues concerning the furnishing of temporary total disability compensation and medical treatment. Accordingly, the ALJ did not exceed his jurisdiction in entering his order of May 1, 2007, and the Board, therefore, does not have jurisdiction to review that order at this stage of the proceedings.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a

¹ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

² *Keathley v. Brown & Brown, Inc.*, 2007 WL 435904 (Kan. WCAB Jan. 24, 2007) at 5.

³ K.S.A. 2006 Supp. 44-551.

⁴ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁵

Unfortunately, this Board Member finds that there is no jurisdiction to hear this matter at this juncture of the claim. Whether a TTD rate is appropriate is not an issue over which the Board has jurisdiction following a preliminary hearing. By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal from the Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore dated May 1, 2007, is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of June, 2007.

BOARD MEMBER

c: Scott M. Price, Attorney for Claimant
Douglas A. Dorothy, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁶ K.S.A. 44-534a(a)(2).

⁷ K.S.A. 2006 Supp. 44-555c(k)